SUPREME COURT, U.S.

OCT 9 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-406

GEORGE DENTI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	3
STATEMENT OF PROCEEDINGS	3
REASONS FOR GRANTING THE WRIT	5
ARGUMENT:	
STATEMENT OF FACTS	6
I—The Court of Appeals, in sustaining petitioner's indictment and conviction notwithstanding the Government's deliberate decision to unlawfully deprive petitioner of his right to an administrative hearing before indictment, has sanctioned the Government's violation of petitioner's rights in contravention of the due process clause of the Fifth Amendment to the United States Constitution as interpreted by controlling decisions of this Court	8
A. Petitioner's rights as guaranteed by the Internal Revenue Service regulations, and the Government's violation of those rights	8
B. The Applicable Law	16
II—The decision of the Court of Appeals, in sanctioning the Government's violation of its own published regulations, also conflicts with decisions rendered by Courts of Appeals in other federal judicial circuits	22

PAGE

III—The manner in which the federal immunity statutes have been interpreted and applied by the courts below operates arbitrarily, in violation of the guarantees of due process, to deny the use of the mechanism of immunity to a defendant to secure the testimony of a recalcitrant witness, while making such mechanism available to the Government to secure related testimony of that same witness 23

IV—The trial Court deprived petitioner of a fair trial by demeaning his defense in the presence of the jury and hampering his presentation thereof 24

CONCLUSION 24

APPENDIX:

A—Decision and Opinion of the United States Court of Appeals for the Second Circuit 1a

B—Order of Court of Appeals Denying Petition for Rehearing 3a

Order of Court of Appeals Denying Petition for Rehearing En Banc 5a

C—Constitutional Provisions, Statutes and Regulations Involved 6a

Cases Cited

Accardi v. Shaughnessy, 347 U.S. 260 (1954).....16-18, 21

Donaldson v. United States, 400 U. S. 517 (1971)..... 15

Service v. Dulles, 354 U.S. 363 (1957).....17, 18, 21

Sullivan v. United States, 348 U.S. 170 (1954).....19-21

PAGE

United States v. Cox, 342 F.2d 167 (5th Cir. 1965), cert. denied 381 U.S. 935 21

United States v. Heffner, 420 F.2d 809 (4th Cir. 1969) 22

United States v. Hutul, 416 F.2d 607 (7th Cir. 1969), cert. denied 396 U.S. 1007 ..... 20, 21

United States v. Leahey, 434 F.2d 7 (1st Cir. 1971) 22

United States v. Nixon, —— U.S. ——, 94 S.Ct. 3090 (1974) 16, 21

United States v. Phifer, 335 F. Supp. 724 (S.D.Tex. 1971) 22

United States ex rel Zapp, et al. v. District Director of Immigration & Naturalization, 120 F.2d 762 (2d Cir. 1941) 10

Vitarelli v. Seaton, 359 U.S. 535 (1959) 18, 21

Yellin v. United States, 374 U.S. 109 (1963) 18, 19, 21

United States Constitution Cited

Fifth Amendment 2, 3

Statutes and Regulations Cited

18 U.S.C.:

Sec. 371 ..... 3, 4

26 U.S.C.:

Sec. 7122(a) 3, 9

Sec. 7201 ..... 3, 4

Sec. 7206(1) 3, 4

PAGE

28 U.S.C.:

Sec. 1254(1) 2

44 U.S.C.:

Sec. 1507 10

Internal Revenue Practice General Procedure Rules:

Sec. 601.107(b)(2) 3, 9, 11

Sec. 601.107(b)(2) (as amended effective April 12, 1973) 3, 11

Sec. 601.107(c)(1) 3, 13

Sec. 601.107(c)(2) 13

Other Authorities Cited

Bacon, 34 Journal of Taxation:

198, 201 14

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Sec. 401.4 13

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69 14

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Petitioner George Denti respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 18, 1974.

Opinion Below

The one-page memorandum decision of the Court of Appeals, which is unreported, is reprinted as Exhibit A an-

nexed hereto. No opinion was rendered by the United States District Court, Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals was entered on July 18, 1974. A timely petition for rehearing, with a suggestion for hearing *en banc*, was denied on September 9, 1974 (Appendix B annexed hereto). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the due process clause of the Fifth Amendment to the United States Constitution, which has been held by this Court and the Courts of Appeals of other federal judicial circuits to require a governmental agency to abide by its own published regulations, dictates reversal of petitioner's conviction and dismissal of the indictment because the Government deliberately and unlawfully deprived petitioner of his right to an administrative conference within the Internal Revenue Service as guaranteed to petitioner by published regulations of the Internal Revenue Service.

2. Whether the due process clause of the Fifth Amendment to the United States Constitution permits the granting of immunity at trial to a witness called by the Government, and the withdrawal of that immunity, or refusal to grant similar immunity, at a later stage of the same trial when the same witness is called on behalf of the defense to testify to related matters.

3. Whether it is error and a violation of due process for the trial court in a federal criminal case to demean the defendant's defense in the presence of the jury and to erroneously hamper the presentation of such defense.

Constitutional, Statutory and Regulatory Provisions Involved

United States Constitution, Fifth Amendment
United States Code

Title 18

Sec. 371

Title 26

Sec. 7122(a)

Sec. 7201

Sec. 7206(1)

Internal Revenue Practice General Procedure Rules

Sec. 601.107(b)(2)

Sec. 601.107(b)(2) (as amended effective April 12, 1973)

Sec. 601.107(c)(1)

(The above provisions are set forth in Appendix C annexed hereto).

Statement of Proceedings

Petitioner George Denti was charged in six counts of a nine-count indictment filed in the United States District Court for the Southern District of New York on May 3, 1973, which named as co-defendants Michael Pa-

terno and Paterno & Sons, Inc. Counts 2-5 charged all three defendants with having attempted to evade the corporate income taxes of Paterno & Sons, Inc. for each of the fiscal years ending February 28, 1967 through February 28, 1970, in violation of 26 U.S.C. §7201. Count 1 charged all defendants with having conspired to evade the corporation's income taxes for those years and for the fiscal year ending February 28, 1966, in violation of 18 U.S.C. §371. Count 9 charged petitioner Denti with having made and subscribed the corporate income tax return for the fiscal year ending February 28, 1970, knowing such to be materially false in that said return allegedly overstated the corporation's equipment rental and equipment repair deductions in violation of 26 U.S.C. §7206(1) (Counts 6-8 charged co-defendant Paterno with the same violation of 26 U.S.C. §7206(1) for the fiscal years ending February 28, 1967 through February 28, 1969).

At no time prior or subsequent to the indictment was petitioner Denti (or either of his co-defendants) afforded any administrative conference within the Internal Revenue Service to which he was entitled under the published regulations of the Internal Revenue Service (see *infra*, pp. 8-16).

Trial of the action against all defendants commenced on February 6, 1974 before the Hon. Marvin E. Frankel and a jury. On February 22, 1974 the jury returned a verdict finding all defendants guilty as charged in all counts. Petitioner Denti was sentenced to nine months in prison on each count, the sentences to run concurrently, and fines of $2,000.00 on Counts 1-5, the fines can be cumulated. The judgment against petitioner was stayed pending his appeal to the United States Court of Appeals for

the Second Circuit. On July 18, 1974 the judgment of the District Court was affirmed in all respects in an Order accompanied by a brief memorandum not discussing the arguments hereafter set forth, which were raised on petitioner's behalf in the trial Court and in his brief and oral argument to the Court of Appeals. The Court of Appeals rendered no opinion, and offered no comment upon these issues, in denying a subsequent petition for rehearing or hearing *en banc*. Following affirmance of petitioner's conviction, the Court of Appeals denied petitioner's motion for a stay of issuance of the mandate pending petitioner's application for a writ of certiorari.

Petitioner's co-defendants are filing a separate petition for a writ of certiorari.

Reasons for Granting the Writ

1. The Court of Appeals' decision, in approving the unlawful violation by the Government of its own published regulations, contravenes controlling decisions of this Court, and conflicts with the governing legal principle followed by the Courts of Appeals of other federal judicial circuits.

2. The manner in which the federal immunity statutes have been interpreted and applied by the courts below operates arbitrarily, in violation of the guarantees of due process, to deny the use of the mechanism of immunity to a defendant to secure the testimony of a recalcitrant witness, while making such mechanism available to the Government with respect to the same witness.

3. The trial Court deprived petitioner of a fair trial by demeaning his defense in the presence of the jury and by hampering his presentation thereof.

Statement of Facts

Paterno and Sons, Inc. was in the business of sewerage construction and installation, involving, among other things, the excavation and transportation of large masses of earth, and necessitating the hiring of a great many independent truckers (1210a*-1212a). The Government's allegations with respect to all counts against all defendants arose out of the Government's contention that 48 corporate checks made out during the period in question to five payees, which were deducted as expenses for equipment rentals and equipment repairs in connection with the corporation's trucking expenses on the corporation's income tax returns, were not in fact paid for trucking expenses. The Government claimed that the deductions were known to the defendants to have been false, as the trucking expenses represented by the 48 checks were allegedly never in fact incurred.

The prosecutor admitted at trial that "the Government does not know what happened to this money." (95a; 1827a) The Government's evidence viewed in the light most favorable to the Government, tended to show that no truckers existed with the names of the payees of the 48 checks; that on certain of the days for which the corporation was billed (and checks were issued) per invoices alleged by the Government to be fictitious, no work had been done at the locations specified on the invoices; and that petitioner had endorsed the payee's name on the back of five of 48 of the checks in question. (There was testimony, however, that at least one legitimate employee of the corporation would sometimes request someone else to endorse his signature in order to obtain cash rather than a check (1245a-

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* The letter "a" preceded by a number designates page reference to the Joint Appendix in the Court of Appeals.

1246a).) There was no testimony that petitioner received any of the moneys.

It was the contention of petitioner (and his co-defendants) that the moneys paid to the five allegedly fictitious truckers, taken as deductions on the corporation's income tax returns, were in fact paid for trucking services necessarily and actually incurred by the corporation, whether or not the actual names of the truckers who performed the services were the names that appeared on their invoices and on the checks paid to them. Moreover, the individual defendants contended that even if these checks were not issued for trucking expenses, the Government failed to prove that they had knowledge of this alleged fact. They established that it was common practice in the trucking business for a regular trucker to hire someone else or to rent his truck to someone else; that some truckers owned trucks which did not bear their names; that the rules requiring union membership or workmen's compensation payments for trucking done at construction sites were easily and frequently breached; that truckers would often be hired by the day, and that frequently dump trucks and excavation trucks were obtained on a daily basis at the job-sites by whomever might be in charge on a given day (523a-524a, 535a-538a, 554a, 612a, 808a, 1112a, 1213a, 1304a, 1415a).

Moreover, the defendants attempted to establish that in order for the work which the corporation performed on the job-sites specified on the disputed truckers' invoices to have been performed, it was physically impossible to have been done without incurring the trucking expenses represented by the 48 checks to the five disputed truckers. (The jobs which were undertaken by the corporation were completed as required by the specifications in the corporation's agreements with the various contracting parties (see *e.g.*, 1190a, 1412a).) To establish this, the defendants

called as expert witnesses engineers who, it was proffered, would testify to the corporation's necessary costs in trucking the amount of dirt required to be trucked pursuant to the majority of the jobs billed for on the invoices bearing the questioned truckers' names. This testimony was to be based on evidence in the record establishing the amount of material required to be trucked, the distance to be covered, and the costs required to truck that amount of material over that much distance. But petitioner (and his co-defendants) were prohibited by the trial Court from presenting this defense (see Points III and IV, *infra*). Petitioner, who did not testify, also presented testimony of six character witnesses.

ARGUMENT

I. The Court of Appeals, in sustaining petitioner's indictment and conviction notwithstanding the Government's deliberate decision to unlawfully deprive petitioner of his right to an administrative hearing before indictment, has sanctioned the Government's violation of petitioner's rights in contravention of the due process clause of the Fifth Amendment to the United States Constitution as interpreted by controlling decisions of this Court.

A. Petitioner's rights as guaranteed by the Internal Revenue Service regulations, and the Government's violation of those rights.

Petitioner filed a pre-trial motion for dismissal of the indictment on the ground that he was not afforded administrative conferences provided for in the published regulations of the Internal Revenue Service, in the Internal Revenue Service Manuals, and in the Internal Revenue Service's established procedures as prerequisites for indictment for criminal tax offenses (18a et seq.). The Gov-

ernment did not deny in the District Court that petitioner had not been granted any administrative conference, asserting instead that "there is no obligation to hold a conference at any level" (39a). The District Court denied petitioner's motion, without opinion. The Court of Appeals' brief opinion affirming petitioner's conviction, and the Court of Appeals' order denying the petition for rehearing or hearing *en banc,* also contain no discussion of the Government's deliberate violation of petitioner's right to an administrative conference.

Prosecution of criminal tax offenses differs from prosecution of other federal criminal offenses in the significant respect that the Secretary of the Treasury and the Attorney General are empowered to exercise discretion in favor of compromising "civil or criminal" tax cases, pursuant to the provisions of 26 U.S.C. §7122(a), which states:

> "The Secretary or his delegate may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense."

Accordingly, there are four levels of administrative review which may be made available to a prospective defendant and which have been established by specific published regulations or traditional procedures.

Published regulations of the Internal Revenue Service provide for conferences in the Internal Revenue Service at the first two levels of administrative review of recommended criminal tax prosecutions. Section 601.107(b)(2) of the Internal Revenue Practice General Procedure Rules, promulgated in 1968 and in effect at the time of the investigation of petitioner, provided:

> "Every person who may be the subject of a recommendation for prosecution shall be given an opportunity to explain his participation in the alleged criminal violation prior to the submission of the case to Regional Counsel, unless compelling reasons exist to the contrary. At this interview the principal will be informed by a general oral statement of the alleged fraudulent features of the case, to an extent consistent with protecting the Government's interests and. at the same time, making available to the taxpayer sufficient facts and figures to acquaint him with the nature, basis and other essential elements of the proposed criminal charge against him."*

The language of this Rule is clearly mandatory: the prospective defendant "*shall* be given the opportunity to explain his participation," and "*will* be informed . . . of the alleged fraudulent features of the case."** The sole exception to the compulsory language of the rule are those cases where "compelling reasons exist to the contrary." There was no such claim (and no attempted showing) made by the Government of any such "compelling reasons" in the instant case.

The compulsory language of this Section is highlighted by a revision of the rule effective April 12, 1973. (The effective date is specified in the published regulation as

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* This regulation was duly published in the Federal Register at 33 FR 17236. The contents of the Federal Register are required to be judicially noticed. 44 U.S.C. 1507.

** That the words "shall" and "will" denote mandatory action rather than discretion is obvious. See, *e.g., United States ex rel Zapp, et al.* v. *District Director of Immigration & Naturalization,* 120 F.2d 762, 765 (2d Cir. 1941).

amended.) The District Court denied without opinion petitioner's alternative motion for a hearing at which, *inter alia*, the date of the referral by Intelligence to Regional Counsel could be established. However, the Government admitted during oral argument in the Court of Appeals that the investigation of petitioner had already been referred to Regional Counsel by Intelligence before April 12, 1973. Thus, at the time of the referral, petitioner had an unconditional right to a hearing in Intelligence prior to such referral.

The new provision effective April 12, 1973 changed the rule governing administrative conferences in Intelligence to the following:

> "A taxpayer who may be the subject of a criminal recommendation will be afforded a district intelligence conference when he requests one or where the Chief, Intelligence Division, makes a determination that such a conference will be in the best interests of the Government. At the conference, the IRS representative will inform the taxpayer by a general oral statement of the alleged fraudulent features of the case, to the extent consistent with protecting the Government's interests, and, at the same time, making available to the taxpayer sufficient facts and figures to acquaint him with the basis, nature, and other essential elements of the proposed criminal charges against him." §601.-107(b)(2), Internal Revenue Practice General Procedure Rules, as amended April 12, 1973.

Thus, a prospective defendant will now receive a District Intelligence conference only where he requests one or where the Chief of the Intelligence Division determines that such a conference "will be in the best interests of the Government." Under the Internal Revenue Service

Rule applicable to the instant case, however, no such request by a prospective defendant was necessary, and the Chief of Intelligence did not have this wide freedom of choice as to whether or not to grant a conference; as noted above, the published rule promulgated by the Internal Revenue Service entitled prospective defendants to a conference in Intelligence, without request and without any such determination by the Chief of the Intelligence Division. Moreover, the Government admitted during oral argument in the Court of Appeals that it had made a unilateral decision not to grant petitioner (or either of his co-defendants) an administrative conference even if one had been requested, so that any request for a hearing would have been an entirely useless act.

The fact that the regulation which the Government violated has been amended subsequent to the violation does not render academic the issue raised herein. The regulation as amended still grants a prospective defendant the right to a conference at Intelligence if he requests one, and the Government admitted during oral argument in the Court of Appeals that a decision had been made by the Government not to grant petitioner a conference even if he had requested one. The Government has thus taken the position that it is free to violate at will its own published regulation even as amended and presently applicable.

The absolute right of a prospective defendant to an administrative conference in Intelligence is further highlighted by the discretionary nature of the conference provisions at the next stage of review in the Internal Revenue Service, at the level of Assistant Regional Commissioner, Intelligence, where a prospective defendant's case is forwarded if the Intelligence Division recommends criminal prosecution.

> "The Assistant Regional Commissioner (Intelligence) *may* grant a conference to the subject of a criminal tax investigation referred to his office." §601.107(c)(1), Internal Revenue Practice General Procedure Rules. (Emphasis added)

If the Assistant Regional Commissioner (Intelligence) concurs in the recommendation of the Special Agent for criminal prosecution, he forwards the case to Regional Counsel, Criminal Tax Section, of the Internal Revenue Service. General Statement of Procedural Rules, §601.107 (c)(2). The Rule provides that when the case is transferred to Regional Counsel, the Regional Commissioner "shall ordinarily notify the subject of an investigation and his authorized representative." No such notification was made in the instant case.

At Regional Counsel, which is the last level of administrative review within the Internal Revenue Service, a hearing is generally provided. See §401.4 of the Regional Counsel Enforcement Division Manual, which provides:

> "It is the practice of the Chief Counsel's office to offer a conference opportunity to each prospective defendant in a criminal tax case. Conferences are generally granted, if requested, or if Regional Counsel concludes that such a conference would serve a useful purpose."

If Regional Counsel concurs in the recommendation for criminal prosecution, the case is transmitted to the Criminal Section of the Tax Division of the Department of Justice in Washington, D. C. Although no published rules govern a prospective defendant's right, if any, to a conference at Justice, a prospective defendant is generally "advised by the Revenue Service that the case has been

transmitted to the Department of Justice and that the Department will grant [a] conference if requested." *Defending Tax Fraud Prosecutions,* "Administrative Processes After Investigation Is Completed," Richard M. Roberts, Deputy Assistant Attorney General in the Tax Division, U. S. Department of Justice, Practicing Law Institute, 69 (1970). If it is concluded that criminal prosecution is warranted, the case is then forwarded to a United States Attorney's Office for presentation to a grand jury.

Thus, an elaborate administrative framework has been established, through published rules and unpublished general practice, for thorough administrative review of prospective criminal cases before an indictment is sought and obtained, and for a prospective defendant's right to participate in at least one such conference (at Intelligence) and his right to be kept informed as the case is transmitted to various other levels. As the Assistant Commissioner of the Internal Revenue Service has stated,

> "Throughout the [administrative] review process, the taxpayer's counsel, if he so desires, may take advantage of the opportunity to avail himself of conferences at each level to press factual and legal arguments in the interests of his client." Bacon, 34 Journal of Taxation 198, 201.

The importance of a prospective defendant's right to an administrative hearing in Intelligence has been recognized by this Court in its observation that:

> "In 1969, 2,080 full-scale tax fraud investigations were undertaken by the intelligence divisions. Only 1,049, or approximately half, of these resulted in recommendations for prosecution. In the 1,031 cases not recommended for prosecution, some $20,000,000 in deficiencies and penalties resulted and

> were earmarked for collection civilly. 1969 Annual Report of the Commissioner of Internal Revenue 28-31." *Donaldson* v. *United States,* 400 U.S. 517, 535, n. 17 (1971).

Thus, this Court has recognized that the importance of the proceedings at the Intelligence level cannot be minimized. Approximately half of all potential defendants manage to obtain from Intelligence recommendations against prosecution. The right to state one's position at an Intelligence conference, and to attempt to persuade the authorities there that a given case should not be referred for criminal prosecution, is a substantial right which in approximately half the cases does in fact result in recommendations against prosecution. Obviously, proceedings in Intelligence are not merely an invariable conduit for prosecution, but combine the functions of fact-finding and exercises of discretion resulting in reasoned decisions concerning whether or not to prosecute criminally. A potential defendant's right to be heard at an Intelligence conference, as guaranteed him by the Internal Revenue Service's published regulations, is not merely an empty step toward an inevitable conclusion. As this Court further recognized in *Donaldson,* "the fact that a full-scale tax fraud investigation is being made does not necessarily mean that prosecution ensues when tax liability becomes apparent." 400 U.S. at 535.

In the instant case, no opportunity whatever was given to petitioner (or to his co-defendants) to attempt to persuade Intelligence not to refer the case against him to Regional Counsel as a criminal matter, nor did the Internal Revenue Service comply in any respect with its own regulations prescribing the necessary steps that must be taken before any prosecution such as this could be

had. The Government by its own admission made a deliberate unilateral decision to deprive petitioner of his right to an administrative conference, in direct violation of the Internal Revenue Service's own published regulations and without any semblance of justification or excuse. Under the following principles as set forth in this Court's previous decisions, the Government's violation of petitioner's rights entitles petitioner to a dismissal of the indictment.

B. The Applicable Law

This Court has often reiterated the principle that the dictates of due process require a governmental agency to comply with its own published regulations. Most recently, in *United States* v. *Nixon,* —— U.S. ——, 94 S.Ct. 3090, 3101-3102 (1974), this Court, in sustaining the right of the Special Prosecutor to contest the President's invocation of executive privilege where a published regulation gave that right to the Special Prosecutor, explicitly held:

> "So long as this regulation is extant it has the force of law. . . . So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it."

This Court's holding in *United States* v. *Nixon* was a reaffirmation of settled legal principles established in numerous previous decisions of this Court. In *Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954), petitioner attacked the validity of the denial by the Board of Immigration Appeals of suspension of his deportation. "Regulations

with the force and effect of law supplement the bare bones of"* the applicable statute, and provided for independent administrative review at three levels below the Attorney General. This Court held that if petitioner could prove his allegation that the Attorney General's public statement before a final decision by the Appeals Review Board resulted in "the Board's alleged *failure to exercise* its own discretion"**, petitioner would be entitled to a new hearing before the Board.

Similarly in the instant case, the published regulations of the Internal Revenue Service bind the Service to exercise its discretion and make its decisions at the various administrative levels after a prospective defendant has been given an opportunity to participate in the conferences provided by regulations, on at least one administrative level, that of Intelligence. It is respectfully submitted that the Government's failure to comply with this regulation vitiated the subsequent criminal prosecution.

The same principle was applied, and a similar result obtained, in *Service* v. *Dulles,* 354 U.S. 363 (1957), where this Court reinstated a Government employee who had been discharged by the Secretary of State under a procedure which violated a published regulation governing such discharges. The factual situation in *Service,* as in the instant case, involved an inherently discretionary act by Government officials—in *Service* the determination of whether or not to discharge the employee, and in the instant case the determination of whether or not to recommend prosecution. Under these circumstances this Court held that under the doctrine of *Accardi* v. *Shaughnessy,*

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* 347 U.S. at 265.

** 347 U.S. at 268; emphasis in original.

supra, notwithstanding the inherently discretionary nature of the administrative decision-making process,

> "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." 354 U.S. at 372.

This Court reached a similar result in *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959). There, this Court granted a former Government employee reinstatement after his discharge, on the grounds of "noncompliance by the Secretary [of the Interior] with regulations promulgated by him in a departmental Order . . . [T]he Secretary, here, as in Service, was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily." 359 U.S. at 539-540.

This same principle was applied by this Court in reversing a conviction for criminal contempt of Congress in *Yellin* v. *United States,* 374 U.S. 109 (1963). There, this Court held that petitioner was entitled, in proceedings held before a Congressional Committee, to be treated in accordance with that Committee's own rules—specifically, petitioner was entitled to have the Committee exercise its discretion in determining whether the potential harm to the petitioner's reputation justified holding hearings in closed session. The Committee, like the Internal Revenue Service in the instant case, failed to follow the requirements of its published rules in making an inherently discretionary decision. This Court held:

> "The Committee has at least undertaken to consider a witness' reputation and the efforts a witness makes to protect it, even though the Committee

> may in its discretion nevertheless decide thereafter to hold a public hearing." 374 U.S. at 118.
>
> "Yellin might not prevail, even if the Committee takes note of the risk of injury to his reputation or his request for an executive session. But he is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted in Rule IV." 374 U.S. at 121.

The instant case presents a similar set of circumstances. If petitioner had been granted the administrative conference in Intelligence to which he was entitled, the Internal Revenue Service may have decided nevertheless to recommend prosecution against him. But petitioner was at least entitled to have the authorities in Intelligence exercise their discretion after considering his presentation there, even if his presentation might have been rejected after having been heard and considered. The fact is that before petitioner's case was referred to Regional Counsel, petitioner had a right to attempt to persuade the Internal Revenue authorities at a District Intelligence conference that the case against him should not be handled criminally. At this conference, formal rules of evidence would not have applied and the evidentiary roadblocks that prevented petitioner from adequately presenting his defense at trial would not have existed (see *supra,* Points III and IV). Yet the Government, without any justification or excuse, peremptorily deprived petitioner of this right.

This case is entirely unlike the situation in *Sullivan* v. *United States,* 348 U.S. 170 (1954). There, this Court held that where a wholly internal circular letter of the Department of Justice directed that all United States Attorneys present criminal tax cases to grand juries only when authorized by the Attorney General's office, and a

United States Attorney presented evidence to and obtained an indictment from a grand jury without the authorization provided for in the circular letter, such circumstances were insufficient to warrant dismissal of the indictment. This Court held that the circular letter "was simply a housekeeping provision of the Department," and as such "it was never promulgated as a regulation of the Department and published in the Federal Register." 348 U.S. at 173.

This rationale underlying *Sullivan* is simply absent in the instant case. The regulation granting a prospective defendant a conference in Intelligence is, as noted above, publicly published, and is not merely an internal "housekeeping" provision allocating responsibility within a governmental agency. The significance of this distinction is apparent in *United States* v. *Hutul,* 416 F.2d 607 (7th Cir. 1969), cert. denied 396 U.S. 1007, where as in *Sullivan* a defendant moved for dismissal of an indictment returned by a federal grand jury after his acquittal of similar charges in State Court because, despite a previous press release from the Attorney General declaring that no such prosecutions would be brought without the Attorney General's approval, the Attorney General had not approved the indictment against the appellant. The court in *Hutul,* citing *Sullivan* as authority, observed:

> "A letter, press release, or similar statement by the Attorney General, which is not promulgated as a regulation of the Justice Department and published in the Federal Register, cannot serve to invalidate an indictment returned by the grand jury. Rather, such a provision is merely a 'housekeeping provision' of the Justice Department and is so limited in its effect." 416 F.2d at 626.

The clear implication of this Court's holding in *Sullivan* and the Seventh Circuit's holding in *Hutul* is that if the procedure resulting in an indictment does in fact violate a published regulation, the indictment should be invalidated. Such is the case here.

In anticipation of the Government's likely argument to this Court against granting the writ of certiorari, petitioner respectfully submits that the fact that it was a grand jury which returned the indictment is not an adequate reason for carving out an exception to the *Nixon, Accardi, Service, Vitarelli,* and *Yellin* line of cases. It is clear that a grand jury cannot return an indictment without the consent and signature of the United States Attorney. *United States* v. *Cox,* 342 F.2d 167 (5th Cir. 1965), cert. denied 381 U.S. 935. As this Court stated in *United States* v. *Nixon, supra,* ——U.S. at ——, 94 S. Ct. at 3100, citing *United States* v. *Cox* with approval:

> "[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."

The fact is that in this case the Executive Branch presented the evidence against petitioner to the grand jury, a representative of the Executive Branch signed the indictment to give it legal force and effect, the Executive Branch had the ultimate power to control the decision to prosecute, and the Executive Branch, without reason or justification of any type, deliberately deprived petitioner of his unconditional right as provided in the Internal Revenue Service's own regulations to have at least one administrative conference and to be apprised of the various procedural steps as his case progressed from investigation to indictment. The Government has at no time offered any reason for this deprivation of petitioner's rights at the administrative level. There is no remedy available to petitioner other than dismissal of the indictment.

II. The decision of the Court of Appeals, in sanctioning the Government's violation of its own published regulations, also conflicts with decisions rendered by Courts of Appeals in other federal judicial circuits.

It is also respectfully submitted that the decision of the Court of Appeals, in sustaining the Government's deliberate violation of petitioner's right to a conference, also conflicts in principle with decisions of the Courts of Appeals for other federal judicial circuits with respect to violations of a potential defendant's rights granted by the Internal Revenue Service. For example, in a news release issued to its special agents, the Internal Revenue Service instructed those agents that, before interrogation of taxpayers, the special agent must inform each taxpayer of his constitutional rights. Where the agents fail to give that warning, even though the warning is not required under *Miranda* because of its precustodial nature, statements made by the taxpayers will be suppressed as evidence in a criminal trial. *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969); *United States* v. *Leahey*, 434 F.2d 7 (1st Cir. 1971); *United States* v. *Phifer*, 335 F. Supp. 724 (S.D.Tex. 1971). "Due process requires the I.R.S. to follow its announced procedures." *United States* v. *Leahey*, 434 F.2d at 10. The decision of the Court of Appeals in the instant case directly conflicts with this principle.

It is significant that the sanction imposed by the courts upon the Government in the above-cited cases resulted from the failure of Government agents to follow a directive that appeared only in an internal news release. In the instant case, the regulations which the Government ignored were publicly published. They were promulgated with a more substantial imprimatur of law, and their

breach by the Government officials in this case should therefore be deemed to have been more egregious. Moreover, the instant case was not one in which a Government agent inadvertently violated a defendant's rights; rather, as the Government itself has admitted, a deliberate decision was made to deprive petitioner of his right to a hearing, with no justification or excuse. Under these circumstances, the deterrent value of a sanction imposed to prevent future violations is especially appropriate.

Throughout these proceedings, the Government has suggested no justification for its decision to deprive petitioner of his right to an administrative conference. What happened in this case, it is respectfully submitted, is that the Government, for no justifiable reason or excuse, chose simply to violate the law and to deprive petitioner of a substantial right. Under these circumstances, it is respectfully submitted that the only appropriate sanction, the only means of preservation of petitioner's right to an administrative conference which the Government ignored, and the only effective means of deterring the Government from future violations, is for this Court to reverse petitioner's conviction and to order dismissal of the indictment.

III. The manner in which the federal immunity statutes have been interpreted and applied by the courts below operates arbitrarily, in violation of the guarantees of due process, to deny the use of the mechanism of immunity to a defendant to secure the testimony of a recalcitrant witness, while making such mechanism available to the Government to secure related testimony of that same witness.

Petitioner adopts the argument contained in Point I of the Petition for a Writ of Certiorari submitted on behalf of Michael Paterno and Paterno & Sons, Inc.

IV. The trial Court deprived petitioner of a fair trial by demeaning his defense in the presence of the jury and hampering his presentation thereof.

Petitioner adopts the argument contained in Point 4 of the Petition for a Writ of Certiorari submitted on behalf of Michael Paterno and Paterno & Sons, Inc.

CONCLUSION

For the above reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS BENDER
Attorney for Petitioner
225 Broadway
New York, N. Y. 10007

SANDOR FRANKEL
Of Counsel

APPENDIX A

Decision and Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of July one thousand nine hundred and seventy-four.

Present:

WILLIAM HUGHES MULLIGAN, U.S.C.J.
HARRISON L. WINTER, U.S.C.J.
JON O. NEWMAN, U.S.D.J.
Circuit Judges,

74-1554, 74-1555, 74-1556

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL PATERNO, GEORGE DENTI and PATERNO AND SONS, INC.,

Defendants.

MICHAEL PATERNO, PATERNO & SONS, INC., GEORGE DENTI,

Defendants-Appellants.

Appendix A

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgments of conviction of said District Court be and they hereby are affirmed. During argument of the appeal the Government made a comparison between the average costs for engaging recognized truckers and those claimed to be fictitious. Counsel for Paterno moved orally after argument to submit responding papers. In view of the overwhelming evidence of guilt we do not consider the point material. The motion is denied.

William Hughes Mulligan, U.S.C.J.
Harrison L. Winter, U.S.C.J.
Jon O. Newman, U.S.D.J.

APPENDIX B

Order of Court of Appeals denying Petition for rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and seventy-four.

Present:

HON. HARRISON L. WINTER,
HON. WILLIAM H. MULLIGAN,
Circuit Judges
HON. JON O. NEWMAN,
District Judge

DOCKET NO. 74-1554

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL PATERNO, GEORGE DENTI and
PATERNO AND SONS, INC.,

Defendants-Appellants

A petition for rehearing having been filed herein by counsel for the appellant, George Denti,

Appendix B

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

Appendix B

Order of Court of Appeals denying Petition for rehearing *en banc*

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and seventy-four.

Docket No. 74-1554

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL PATERNO, PATERNO AND SONS, INC., GEORGE DENTI,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, George Denti, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Irving R. Kaufman
Chief Judge

APPENDIX C

Constitutional Provisions, Statutes and Regulations Involved

U.S. Const., Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

26 U.S.C. § 7201. Attempt to evade or defeat tax

Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided

by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206. Fraud and false statements

Any person who—

> (1) Declaration under penalties of perjury—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. § 7122. Compromises

> (a) Authorization.—The Secretary or his delegate may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

Appendix C

***Internal Revenue Practice, General Procedure Rules,* § 601.107(b)(2), added Nov. 21, 1968, 33 F.R. 17235:**

§ 601.107. Intelligence functions.

• • •

(b) Investigative procedure. • • •

(2) Every person who may be the subject of a recommendation for prosecution shall be given an opportunity to explain his participation in the alleged criminal violation prior to the submission of the case to Regional Counsel, unless compelling reasons exist to the contrary. At this interview the principal will be informed, by a general oral statement of the alleged fraudulent features of the case, to an extent consistent with protecting the Government's interests and, at the same time, making available to the taxpayer sufficient facts and figures to acquaint him with the nature, basis and other essential elements of the proposed criminal charge against him. • • •

***Internal Revenue Practice General Procedure Rules,* § 601.107(b)(2), as amended April 12, 1973, 38 F.R. 9227:**

§ 601.107. Intelligence functions.

• • •

(b) Investigative procedure. • • •

(2) A taxpayer who may be the subject of a criminal recommendation will be afforded a district intelligence conference when he requests one or where the Chief, Intelligence Division, makes a de-

termination that such a conference will be in the best interests of the Government. At the conference, the IRS representative will inform the taxpayer by a general oral statement of the alleged fraudulent features of the case, to the extent consistent with protecting the Government's interests, and, at the same time, making available to the taxpayer sufficient facts and figures to acquaint him with the basis, nature, and other essential elements of the proposed criminal charges against him.

***Internal Revenue Practice General Procedure Rules,* § 601.107(c)(1):**

§ 601.107. Intelligence functions.

• • •

(c)(1) The Assistant Regional Commissioner (Intelligence) may grant a conference to the subject of a criminal tax investigation referred to his office.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-406

GEORGE DENTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner, Michael Paterno, and Paterno & Sons, Inc., were convicted on all counts of a nine-count indictment. The first count charged George Denti, Michael Paterno, and Paterno & Sons, Inc., with conspiring to evade the income taxes of the corporation for each of its taxable years from 1966 through 1970, in violation of 18 U.S.C. 371. Counts two through five charged the individuals and the corporation with attempting to evade the corporation's income taxes from 1967 through 1970, in violation of 26 U.S.C. 7201. Counts six through nine charged Paterno (Counts six through eight) and Denti (Count nine) with subscribing the false income tax returns of the corporation for the same fiscal years, in violation of Section 7206(1) of the Internal Revenue Code (26 U.S.C.).

The trial court sentenced petitioner Denti to concurrent nine-month prison terms on each count and a total fine of $10,000, and the court of appeals affirmed.

This is a companion case to that of *Michael Paterno and Paterno & Sons, Inc.* v. *United States*, pending on petition for a writ of certiorari, No. 74-394. Petitioner raises essentially the same contentions that are raised in the *Paterno* petition. Accordingly, we are serving petitioner's counsel with a copy of our brief in opposition in that case.

In addition to the arguments presented in the petition in No. 74-394, petitioner urges (Pet. 22-23) that the decision below rejecting the claim that the indictment should be dismissed for failure to grant a conference in the Internal Revenue Service is in conflict with *United States* v. *Heffner*, 420 F.2d 809 (C.A. 4), and *United States* v. *Leahey*, 434 F.2d 7 (C.A. 1). Those cases, however, did not involve the power of the grand jury to indict but related only to the use at trial of statements made by potential defendants to government representatives during the investigation. There is a basic difference, in that "questioning without *Miranda* warnings affects a taxpayer's post-offense actions, while indictment without conference does not." *United States* v. *Goldstein*, 342 F. Supp. 661, 666 (E.D.N.Y.).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

DOJ-1974-12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-406

GEORGE DENTI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
The Amendment Of The Applicable Regulation	2
The Grand Jury's Powers	4
Conclusion	7

Cases Cited

Lawn v. United States, 355 U. S. 339 (1958)	5
Sullivan v. United States, 348 U. S. 170 (1954)	3, 5
United States v. Calandra, 414 U. S. 338 (1974)	5, 6
United States v. Cox, 342 F. 2d 167 (5th Cir. 1965), cert. denied 381 U. S. 935	4, 5
United States v. Heffner, 420 F. 2d 809 (4th Cir. 1969)	7
United States v. Leahey, 434 F. 2d 7 (1st Cir. 1971)	7
United States v. Nixon, —— U. S. ——, 94 S. Ct. 3090 (1974)	4-6

Other Authorities Cited

38 Fed. Reg. 9227	2, 5
Internal Revenue Practice General Procedure and Rules (1968):	
Sec. 601.107(b)(2)	2, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-406

GEORGE DENTI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This reply brief is respectfully submitted on behalf of petitioner George Denti, in response to the Government's "Memorandum in Opposition" to the petition for a writ of certiorari.

The Government contends* that the petitioner's contention regarding his right to dismissal of the indictment

* The Government's contentions with respect to the arguments advanced in petitioner Denti's original brief are set forth both in its "Memorandum in Opposition" to Denti's petition and its "Brief in Opposition" to the companion petition of Denti's co-defendants, Michael Paterno and Paterno and Sons, Inc.

because of the Government's deliberate decision to unlawfully deprive him of his right to an administrative conference should be rejected because, in the Government's view, (1) an amendment to the Internal Revenue Service regulation upon which petitioner relies was allegedly enacted prior to submission of petitioner's case to Regional Counsel, and (2) the deprivation by the Internal Revenue Service of petitioner's right to an administrative conference should not affect or curtail the grand jury's "plenary power" to indict. For the following reasons, it is respectfully submitted that the Government's contentions should be rejected, and that the petition for a writ of certiorari should be granted.

(1) The Amendment Of The Applicable Regulation

The Government states* that petitioner's right to a conference in Intelligence prior to referral of the case to Regional Counsel, as set forth in Section 601.107(b)(2) of the Internal Revenue Practice General Procedure and Rules, "was deleted from the Statement of Procedural Rules effective December 14, 1972, before submission of petitioners' cases to Regional Counsel. See 38 Fed. Reg. 9227." This contention by the Government is simply inaccurate. The effective date of the amendment to the Rules upon which the Government relies was not until April 12, 1973; petitioner respectfully refers the Court to the Federal Register citation upon which the Government relies, which contains no reference whatever to the date which the Government claims was the effective date of the amendment but, rather, establishes the effective

* In its brief in opposition to the Paterno petition, at pages 7-8 thereof.

date as being April 12, 1973, which was subsequent to the referral of petitioner's case to Regional Counsel.

Although the Government's opposing brief in this Court does not suggest any basis for the earlier date claimed by the Government, petitioner assumes that the Government's contention is based upon the same contention which the Government made in its brief in the United States Court of Appeals for the Second Circuit. There, the Government argued that a wholly internal and unpublished memorandum from the Assistant Commissioner (Compliance) and Chief Counsel to all Regional Commissioners and all Regional Counsel, which purported to revoke a taxpayer's right to an administrative conference as provided in the published regulation of the Internal Revenue Service then existing, and to replace it with the revised limited right as later contained in the amended regulation effective April 12, 1973, was dated December 14, 1972. However, even in the memorandum as described by the Government in its appellate brief,* the memorandum dated December 14, 1972 was a mere internal memorandum circulated only within the Internal Revenue Service. It is well-settled law that a wholly internal memorandum such as that relied upon by the Government "was simply a housekeeping provision of the Department" which "was never promulgated as a regulation of the Department and published in the Federal Register," *Sullivan* v. *United States,* 348 U.S. 170, 173 (1954); as such it was of no legal effect and cannot be deemed to have abrogated petitioner's right to a conference as guaranteed by a published Internal Revenue Service regulation. This is further buttressed by the fact that when the published regulation was amended the effective

* This memorandum was reproduced in the Government's appellate brief but was without any evidentiary support in the record.

date of the amendment, as printed in the published amendment, was April 12, 1973, rather than the date of the alleged internal I.R.S. memorandum.

Moreover, it is respectfully submitted that even if the amended regulation had been in effect prior to the referral of the case against petitioner to Regional Counsel, the Government's actions in denying petitioner his right to a conference would have required dismissal of the indictment. Even under the regulation as amended, petitioner would have had an absolute right to an administrative conference by merely requesting one. Yet the Government conceded during oral argument in the Court of Appeals that a decision had been unilaterally made by the Internal Revenue Service not to grant petitioner a conference even if one had been requested. Thus, a request for such a conference would have been a useless and therefore unnecessary act, by the Government's own admission.

(2) The Grand Jury's Powers

The Government claims that even if the Internal Revenue Service violated petitioner's right to an administrative conference, that violation should not affect the grand jury's "plenary power" to indict. This contention by the Government is anticipated in petitioner's original brief at pages 19-21 thereof, and the arguments set forth thereon will not be repeated here. However, it is significant that the Government's brief fails to address this Court's recent holding in *United States* v. *Nixon*, —— U.S. ——, 94 S. Ct. 3090, 3100 (1974), that it is the Executive Branch of the Government which has exclusive authority regarding the decision to prosecute, and the holding in *United States* v. *Cox*, 342 F.2d 167 (5th Cir. 1965), cert. denied 381 U.S.

935, cited with approval by this Court in *United States* v. *Nixon,* that the grand jury is without power to indict absent the consent and signature of the United States Attorney. Instead, the Government relies upon three cases, none of which, it is respectfully submitted, supports its position.

In *Sullivan* v. *United States,* discussed *supra,* upon which the Government relies, this Court held that the Government's violation of provisions contained in a memorandum circulated exclusively within a government agency, and never published in the Federal Register, could not vitiate an indictment. In the instant case, however, petitioner's right to an administrative conference was expressly granted in a published regulation printed in the Federal Register. In *Lawn* v. *United States,* 355 U.S. 339 (1958), upon which the Government also relies, this Court held that where a grand jury returns an indictment valid on its face, and where a motion for dismissal of the indictment is based upon no evidence beyond the defendants' mere suspicion that illegally obtained evidence was presented to the grand jury, the defendants are not "entitled to a preliminary hearing to enable them to satisfy their unsupported suspicions". (355 U.S. at 350) That holding clearly does not affect the instant case, where (1) the motion to dismiss is not based upon suspicion but upon the undisputed fact that petitioner was deprived of his right to a pre-indictment administrative conference, and (2) the issue in question is not merely the nature of the evidence presented to the grand jury, but the proper limitation on the grand jury's power to return an indictment, signed by the United States Attorney, when a defendant is unjustifiably and unlawfully deprived of his right to a pre-indictment administrative conference. Similarly, in *United States* v. *Calandra,* 414 U.S. 338 (1974), upon which the Government also re-

lies, this Court held that a witness who has been properly subpoenaed to testify before a grand jury may not refuse to answer the grand jury's questions simply because those questions are based upon evidence unlawfully seized from the witness; nothing in *Calandra* suggests that a grand jury may itself be used as an instrument to deprive a defendant of a right granted to him by a published regulation of an administrative agency. In declining to extend the exclusionary rule to grand jury proceedings, this Court in *Calandra* held that to do so "would unduly interfere with the effective and expeditious discharge of the grand jury's duties" (94 S. Ct. at 621). No such rationale applies to the instant case: the grand jury's effectiveness would in no way be affected by requiring the Executive Branch of the Government to obey its published regulations. Moreover, in those cases where speedy indictment is of the essence for any reason, the published regulation in question specifically provided for an exception to a taxpayer's right to an administrative conference where "compelling reasons exist" (see Section 601.107(b)(2) of the Internal Revenue Practice General Procedure Rules (1968)). Yet the Government has at no time suggested the existence of any such "compelling reasons"—or any reason whatsoever—for its unilateral decision to unlawfully deprive petitioner of his right to an administrative conference.

Finally, the Government argues that the decision of the Court below does not conflict with decisions rendered with Courts of Appeals in other federal judicial circuits because those other decisions (discussed at page 22 of the petition) involved the use at trial of evidence secured by the Government in violation of the Internal Revenue Service's published regulations, rather than, as here, the grand jury's power to indict in the face of a violation of Internal Revenue Service's published regu-

lations. However, it is respectfully submitted that this attempted distinction does not resolve the conflict. The issue involved in *United States* v. *Heffner,* 420 F.2d 809 (4th Cir. 1969) and *United States* v. *Leahey,* 434 F.2d 7 (1st Cir. 1971) is the same as that of the instant case: May the Internal Revenue Service violate the law as defined in its own published regulations, or should the Court impose sanctions to enforce compliance. In *Heffner* and *Leahey* the Courts did impose an appropriate sanction, the suppression of evidence; in the instant case, the violation resulted not merely in unlawfully obtained evidence but in an unlawfully obtained indictment, and no sanction is available to the Court or to the defendant except dismissal of the indictment. To permit the indictment to stand would leave the Internal Revenue Service with unfettered discretion to violate its own regulations, and therefore to violate the law with impunity, in total disregard of a taxpayer's legally defined rights.

CONCLUSION

For the above reasons, and for the reasons set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

LOUIS BENDER
Attorney for Petitioner
George Denti

SANDOR FRANKEL
Of Counsel